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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANN J. MALONE,
Petitioner,

v.

ANTHONY M. FRANKS, UNITED STATES POSTMASTER GENERAL and UNITED STATES POSTAL SERVICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 25, 1988

QUESTIONS PRESENTED

Does Link v. Wabash Railroad, 370 U.S. 626 (1962) allow a District Court to dismiss Plaintiff's lawsuit as sanction for counsel's one-time failure to comply with a pre-trial order, where the plaintiff bears no responsibility for counsel's failure to comply, and where the trial court afforded plaintiff neither notice nor warning that failure to comply would lead to dismissal?

May a District Court dismiss a lawsuit as sanction for counsel's failure to comply with a pre-trial order, where the court failed to first consider available sanctions less drastic than dismissal or to state reasons for not utilizing such alternative measures?

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The Petitioner ANN J. MALONE respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Courts of Appeals for the Ninth Circuit, entered

in the above-entitled proceeding on November 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, sub nom, Malone v. United States Postal Service, is reported at 833 F.2d 128, and is reprinted in the appendix hereto, p. 1a, infra.

The June 10, 1985 Judgment and Order of Dismissal of the United States District Court for the Northern District of California (Vusakin, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 16a, infra.

JURISDICTION

Invoking federal jurisdiction under 39 U.S.C. sections 401 and 409, pertaining to suits against the POSTAL SERVICE and Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. section 2000(e)2-5f, Petitioner brought this suit in the Northern District of California.

On May 16, 1985, the District Court granted the Defendants' motion to dismiss the suit. The court entered an order and judgment of dismissal on June 10, 1985. See p. 16a, infra.

On Petitioner's appeal, the Ninth Circuit Court of Appeals (on a 2-1 vote, Judge Tang dissenting) affirmed the dismissal. 833 F.2d 128. Petitioner's petition for rehearing and suggestion for rehearing en banc were denied by the Court of Appeals on January 25, 1988.

That order is reprinted in the appendix nereto, p. 24a, infra.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Federal Rules of Civil Procedure 16(e) and (f), 37(b)(2) and 41(b).

Rule 16. Pretrial Conferences; Scheduling; Management.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is

substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B)(C)(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

(b)(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or

prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party:

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

Rule 41. Dismissal of Actions.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may

move for dismissal of an action or of any claim against the defendant . . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

Ann Malone, a black female, was employed at the UNITED STATES POSTAL SERVICE's Oakland, California, Main Office for 18 years, commencing in October 1965. During these years, she received a series of promotions, until her rise through the ranks came to a halt in 1976. Although she was later certified as "qualified" or "highly qualified" for a series of additional promotions, she was not promoted after 1976.

In 1978, Malone began filing charges with the Equal Employment Opportunity Commission, challenging the legality of the POSTAL SERVICE's continuing refusal to promote her. Subsequent to the filing of the initial EEOC complaint, MALONE's evaluations by her supervisors became

less positive. Plaintiff contends that the down-grading of her evaluations, the curtailment of the temporary higher-level assignments (which she had received frequently before 1978), the arbitrary and unjustified disciplinary actions imposed on her, and her eventual dismissal on June 10, 1983, all constituted reprisals or retaliatory actions based upon her discrimination complaints to the EEOC.

MALONE filed an employment discrimination action in 1983. The salient feature of the first trial in her case, in November of 1984, was the District Court's unwarranted exclusion of Plaintiff's key witnesses, all of whom had been identified in Plaintiff's pre-trial statement. Because of the trial court's unjustified exclusion of

important witnesses, Plaintiff's counsel moved for mistrial. Although the trial court initially denied the motion, later the same day the court, on its own motion, declared a mistrial, without stating any reasons for doing so.

At the trial-setting conference of December 13, 1984, the trial judge issued a pre-trial order that was unprecedented and unfair. The court required the parties to submit a list of all questions to be propounded to all witnesses together with the anticipated answers. The trial judge refused to entertain any comments or oral objections, and denied counsel any input into the process. The order expressly stated that there would be no modifications or continuances.

Virtually all the witnesses were employees of the POSTAL SERVICE. For

Plaintiff to have specified every question and every answer to which these witnesses would testify, she would have been obliged to depose many of them. Had Plaintiff put forth in written form the purported testimony of these witnesses, she might have subjected them to either retaliatory action or possible pressure by Defendants to adjust their anticipated testimony. These prospective witnesses all maintained a significant stake in their jobs and in opportunities for advancement.

Also, the pre-trial order also failed to provide any guidance as to the manner in which trial testimony which deviated from the submitted statements would be handled, or as to whether counsel would have latitude to explore areas opened up during the course of such

testimony. [1]

On the April 1985 date designated for filings pursuant to the pre-trial order, 45 days prior to the scheduled commencement of the trial, Plaintiff's counsel did not submit the list of questions and anticipated answers.

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[1] The pre-trial order of December 13, 1984 is appended at p. 24a, infra. Not only was counsel's non-compliance with this onerous order the sole basis for dismissal of Plaintiff's meritorious action, but also there is a serious question as to the District Court's authority under Federal Rule 16 to impose such an order. Its requirements far exceed the traditional pre-trial practice of a narrative summary of witness testimony. See, e.g. Chapman v. Pacific Telephone & Telegraph, 613 F.2d 103 (9th Cir. 1979). The Ninth Circuit's ratification of this particular order conflicts with interpretations of Rule 16 by other circuits limiting the extent to which a trial court may dictate litigation strategy, e.g. Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) or compel counsel to conduct discovery e.g. Identiseal Corp. v. Positive Identification Systems, Inc., 560 F.2d 298, 301 (7th Cir. 1977).

Instead, Plaintiff's counsel filed motions for recusal of the trial judge for prejudice, continuance of the trial date, and modification of the pre-trial orders.

The court issued no rulings at that time, but invited Defendants to file a dismissal motion. At a hearing several weeks later the trial court granted Defendants' motion to dismiss the Complaint based on counsel's failure to comply with the pre-trial order.

At no time did the trial court warn Plaintiff or Plaintiff's counsel that a continued failure to comply with the pre-trial order would result in dismissal of the Complaint. Nor did the court consider the use of alternative sanctions, less drastic than dismissal, or explain its reasons for not imposing

such alternative sanctions. The trial court did not impose sanctions on Plaintiff's attorney or give the Plaintiff an opportunity to proceed with the suit, represented by different counsel. Yet, never was there any suggestion that Plaintiff's discrimination claims were anything but meritorious.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OF A MAJORITY OF CIRCUIT COURTS WHICH ALLOW THE HARSH SANCTION OF DISMISSAL ONLY WHEN THE LITIGANT, AS OPPOSED TO LITIGANT'S COUNSEL, IS SOMEHOW RESPONSIBLE FOR OR AWARE OF COUNSEL'S FAILURE TO COMPLY WITH A COURT'S PRE-TRIAL ORDER.

In Société Internationale v. Rogers, 357 U.S. 197 (1958) this Court held that

a trial court's discretionary authority to dismiss a case without consideration of the merits is limited by constitutional due process considerations:

> There are constitutional limitations upon the power of a court even in the height of its own processes to dismiss an action without affording a party the opportunity for a hearing on the merits of its cause. For this reason the court scrutinizes very carefully dismissals with the prejudice made on these grounds. Société Internationale v. Rogers, 357 U.S. 197, 209 (1958).

Specifically, the Court held that Federal Rule 37 authorizes dismissal without consideration of the merits only if the party's failure to comply with discovery orders can be attributed to wilfulness, bad faith or fault on the part of the petitioner. 357 U.S. at 212.

In Link v. Wabash Railroad Co., 370 U.S. 626 (1962), this Court held that

a trial court did not abuse its discretion when it dismissed a personal injury suit as a sanction for the failure of plaintiff's counsel to appear at a pre-trial conference ordered by the court. In approving this drastic sanction against the plaintiff, although it was plaintiff's counsel who had failed to comply, this Court reviewed the long sequence of delays in prosecution, almost all of them attributable to plaintiff's counsel. (Id. at fn. 11). In such circumstances, the plaintiff may justifiably be held to have notice of the dilatory conduct of his attorney.

In the 26 years and myriad cases since Link v. Wabash Railroad, its holding has given rise to diverse and inconsistent lines of analysis in the Appellate Courts.

A majority of the courts that have had occasion to rule on this point, in at least seven Appellate Circuits, have reversed trial court dismissals of actions where there was no evidence before the District Court to support a finding that the litigant, as distinguished from litigant's counsel, was responsible for or aware of counsel's failure to comply with court rules. In so doing, the Appellate Courts have either distinguished the Link decision, not cited it at all, or have paid lip service to its holding while reaching a contrary conclusion.

In Shea v. Donohoe Construction Company, Inc., 795 F.2d 1071 (D.C. Cir. 1986) a Massachusetts resident was injured in the District of Columbia and brought a suit in the District of

Columbia District Court. His Massachusetts lawyer retained a series of three Washington area lawyers to act as local counsel. For a variety of reasons, local counsel failed to appear at each of the three status conferences scheduled by the trial court. After the third failure to appear, the District judge dismissed the complaint. The Court of Appeals reversed the dismissal as an abuse of discretion, in view of the absence of any reason to believe that the plaintiff was aware of or had engaged in any negligence, dilatory conduct or refusal to comply with court orders.

The court did not cite Link v. Wabash Railroad, but instead cited Circuit precedent in explaining its reasoning:

> [W]here attorney misconduct is involved, this court has been

> notably reluctant to affirm dismissal under the punishment or deterrence rationale unless the client himself is shown to deserve the sanction. (Citations omitted). When the client's only fault is his poor choice of counsel, dismissal of the action has been deemed a disproportionate sanction. Rather, we have frequently said, the District Court should first attempt to sanction the attorney at fault. (citations omitted). (Id. at page 1077).

The court, in footnote 5, also cited 4th, 5th and 6th Circuit cases reversing lower court dismissals in the absence of evidence that the litigant himself was at fault in any way.

In Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir. 1968), the trial court dismissed a claim in an admiralty hearing because claimant's counsel missed a series of court-scheduled pre-trial conferences, and failed to comply with court orders

regarding preparation of pre-trial stipulations. The Court of Appeals was quite critical of counsel's behavior, but reversed the order of dismissal and wrote:

> We are convinced that the able trial judge was more than patient under the circumstances, but we feel that he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him . . . . The appellant was in no way connected with or responsible for his [counsel's] dilatory conduct. While we do not condone that conduct, we feel that the circumstances of the case are not such that the appellant should lose his day in court. (Id. at page 889).

The Flaksa court distinguished this court's holding in Link v. Wabash Railroad in a footnote: "Where the facts are not such as to indicate that the litigant is a participant in the fault, sanctions finally depriving him or his

day in court should be the last resort." Id.

In re Hill, 775 F.2d 1385 (9th Cir. 1985) reversed a trial court's dismissal of an appeal from a Bankruptcy Court ruling. Appellant's counsel, after filing the appeal from the ruling of the Bankruptcy Court, had failed to comply with an order of the court requiring submission of an appeal brief to the District within 15 days after docketing of the appeal. In reversing the dismissal, the court cited a very similar 10th Circuit decision and noted:

> Here, too, the default was the fault of the attorneys and not the litigant. Yet the impact of the sanction imposed is primarily against the client. We have no intent to disavow the established principle that the faults and defaults of the attorney may be imputed to, and their consequences visited upon, his client. We do, however, believe than when any

> court is considering the imposition of sanctions for non-jurisdictional procedural defaults and deficiencies in the management of litigation, the selection of the sanction to be imposed must take into consideration the impact of the sanction and the alternatives available to achieve assessment of the penalties in conformity with fault. Absent such consideration, there is an abuse of discretion. (Id. at page 1387).

Although the court paid its respects to the principle established in Link, it did not cite that decision by name.

Conclusions similar to those reached in Shea, Flaksa and Hill have been reached by the Third Circuit, [2] Fourth

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[2] The Third Circuit decisions are Scarborough v. Eubanks, 747 F.2d 871 (1984), Carter v. Albert Einstein Medical Center, 804 F.2d 805 (1986) and Dunbar v. Triangle, 816 F.2d 126 (1987). Neither Scarborough nor Dunbar make reference to Link. The Carter court notes that the Link principle remains valid, but refers to the increasing practice of imposing sanctions upon the client for the lawyer's misdeeds only as a sanction of

Circuit [3] Sixth Circuit [4] and Tenth Circuit [5].

In contrast to these decisions, a smaller number of appellate courts have applied the Link v. Wabash Railroad analysis regardless of whether the litigant, as distinguished from counsel, had been responsible for a failure to comply with pre-trial orders. In these decisions, the courts have suggested,

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last resort.

[3] A Fourth Circuit decision on point is Dove v. Codesco, 569 F.2d 807, 810 (1978).

[4] A Sixth Circuit decision on point is Carter v. City of Memphis, 636 F.2d 159, 161 (1980), which distinguishes Link on factual grounds, noting the plaintiff was blameless, that plaintiff's counsel had taken some proper steps to prosecute the case, and that both attorneys seemed equally dilatory.

[5] A Tenth Circuit decision on point is In re Russell, 746 F.2d 1419 (1984), in which Link is not cited.

that, for reasons related to the particular case, the client should have become aware of repeated violations or a pattern of dilatory conduct as time passed without a resolution of the dispute.

In Damiani v. Rhode Island Hospital, 704 F.2d 12 (1st Cir. 1983), (Link cited at page 16) the court upheld a district court's dismissal of an anti-trust case because of counsel's dilatory conduct during discovery. The court noted that in an anti-trust action the client could be assumed to be in close contact with counsel at every stage of the proceedings.

In Henderson v. Duncan, 779 F.2d 1421 (9th Cir. 1986) (Link cited in footnote 1), the trial court, before dismissing the action, had specifically

warned plaintiff's counsel three times over a period of 11 months that continued failure to comply with discovery orders would lead to dismissal. The court of appeals upheld the dismissal.

In Cine 42nd Street v. Allied Artists, 602 F.1062 (2nd Cir. 1979), the Appellate Court upheld a dismissal, noting that a corporate officer was aware of counsel's dilatory actions during the discovery proceedings.

There are also decisions in which appellate courts, adhering to the principle set out in Link, affirm lower court dismissals, even in the absence of evidence that the client, as distinguished from counsel, acted improperly, but the courts acknowledge the unfairness of the result, particularly where the client has an

apparently meritorious claim. [6]

In Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, (4th Cir. 1973) (Link cited at pages 576-577) counsel for one of two defendants (a theatre booking agent) relied on counsel for the other defendant (a movie theatre chain) to make appearances and to settle the matter expeditiously. Counsel for the booking agent eventually learned that a judgment had been entered against his client, because of counsel's failure to appear at a hearing on a summary judgment motion. A motion for revocation of that judgment under Rule 60(b) was denied by the trial

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[6] See, e.g. Chapman v. Pacific Telephone & Telegraph Co., 613 F.2d 103 (9th Cir. 1979) in which the trial court imposed sanctions on counsel for failure to comply with a pre-trial order, but allowed plaintiffs to proceed with their cases. As the court of appeals noted, that was a wise exercise of discretion: two of the plaintiffs won favorable verdicts.

court. The court of appeals, citing Link, upheld the trial court's denial of the motion, and suggested quite strongly that the client had a strong malpractice claim against counsel.

In Roland v. Salem Contract Carriers, Inc., 811 F.2d 1175 (7th Cir. 1987) the court followed the analysis in Link, and upheld a dismissal, but recognized the apparent unfairness brought about by application of the rule:

> [W]e recognize that we are in the troubling position of depriving the plaintiffs of what may be a meritorious wrongful death and personal injury suite because of improper conduct that may be solely the fault of the plaintiffs' attorneys. (Id. at page 1180)

Most recently, an appellate court acutely aware of the importance of warning the client of impending dismissal of a possibly meritorious claim because

of negligence of counsel, required the trial court to directly notify the litigant, as well as counsel, prior to holding a hearing on a motion to dismiss. Dunbar v. Triangle, 816 F.2d 126 (3rd Cir. 1987).

In Société Internationale v. Rogers, supra, this Court held that dismissal of a complaint is an appropriate sanction only if the failure to comply with a court order is a result of bad faith, willfulness or fault on the part of the plaintiff. A majority of appellate courts apply this over-riding principle in determining, pursuant to Link, whether to sanction the client for the failures of counsel. A majority of the circuits (including some Ninth Circuit decisions such as In re Hill) hold that a trial court abuses its discretion if it

dismisses the client's case absent reason to believe that the client was in some way at fault for counsel's failure to comply with court orders.

In this case, there is no evidence that Petitioner, as distinguished from her trial counsel, acted in bad faith, willfully violated a court order, or was at fault in any way for her attorney's failure to comply with the court order. Thus, the District Court's dismissal here would be viewed as an abuse of discretion by a majority of the federal circuits.

As Judge Tang pointed out in his dissent to the Ninth Circuit decision, (App. p. 14) at the time of counsel's failure to comply with the court order there remained 45 days before the trial was scheduled to begin. The court could have then warned Plaintiff of the

possibility of dismissal if counsel failed to comply with the pre-trial order. By contrast, the Court of Appeals majority found it "unnecessary" to warn Plaintiff that dismissal was imminent.

However, absent any warning from the court to MALONE that counsel's misconduct was jeopardizing her case, there was nothing Plaintiff could have done to stave off the draconian result.

This Court's 1962 Link decision has been subject to widely varying interpretations by the lower courts. The diverse views of the lower courts, and the Ninth Circuit's rejection of the majority view in this case, justify a grant of certiorari to review the judgment below, so that this Court may provide specific guidance and direction to the circuit courts and trial courts.

II

THE DECISION BELOW, AFFIRMING THE DISTRICT COURT DISMISSAL DESPITE THAT COURT'S FAILURE TO CONSIDER ALTERNATIVE SANCTIONS OR TO EXPLAIN ITS REASONS FOR REJECTING ALTERNATIVES, IS INCONSISTENT WITH THE DECISIONS OF AT LEAST THREE OTHER CIRCUITS, AND WITH OTHER NINTH CIRCUIT PRECEDENTS.

None of the three leading decisions of this Court in this area Société Internationale, supra, Link v. Wabash Railroad, supra, and National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) - considers directly the requirement that the trial court apply or consider the usefulness of alternative sanctions less drastic than dismissal, prior to dismissal of a complaint without a hearing on the merits.

However, the Ninth Circuit has articulated the rule followed in

virtually every federal circuit:

> The District Court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions. United States v. National Medical Enterprises, Inc., 792 F.2d 906, 912 (9th Cir. 1986).

A crucial factual determination to be made in this connection is whether the trial court explicitly discussed the feasibility of less drastic sanctions and explained why such alternative sanctions would be deemed inadequate.

Here, the appellate court without plausible justification excused the trial court's failure to take this necessary step. Seeking to distinguish the Ninth Circuit's own prior rulings, the panel wrote that while this Circuit has "indicated a preference for explicit discussion by the district court . . . .

we have never held that explicit discussion of alternatives is necessary . . . ." Then the court concluded, "the plaintiff" [7] had purposefully and defiantly violated a court order; therefore, no discussion of alternatives was required.

That view is inconsistent with the view of at least three Circuits and with the decision of another Ninth Circuit panel ruling in an earlier case.

In Matter or MacMeekin, 722 F.2d 32 (3rd Cir. 1983), a creditor in a bankruptcy proceeding had failed to answer interrogatories served by the debtor-defendant. The bankruptcy court dismissed the complaint, and this

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[7] As noted above, the Court of Appeals failed to make the necessary distinction between actions of the Plaintiff and actions of Plaintiff's counsel.

dismissal was upheld by the District Court. The dismissal was reversed by the Court of Appeals, which summarized its analysis in this way:

> Accordingly, because the record does not reflect sufficient articulation of the rationale underlying dismissal and a proper rejection of sanctions less severe than dismissal, we will remand for further consideration . . . . (Id. at pp. 35-36).

The requirement enforced in MacMeekin had been set out by the Third Circuit, in its supervision of the district courts, on a prospective basis, in Quality Prefabrication v. Daniel J. Keating Co., 675 F.2d 77 (1982).

In McCloud River Railroad Company v. Sabine River Forest Products, 735 F.2d 879 (5th Cir. 1984), the trial court dismissed the defendant's counterclaim because the defendant had

failed to comply with two court orders, each issued shortly before the scheduled trial date. The defendant's failure to comply with the court orders had made it impossible for the trial to begin as scheduled. The Fifth Circuit reversed the dismissal because of the trial court's failure to consider alternative sanctions and to explain its reasons for rejecting them. The court wrote:

> The district court found a clear record of delay on Sabine's part but made no fact findings regarding the utility of less severe sanctions . . . . [W]e are compelled to vacate the dismissal with prejudice because nothing in the record indicates that less severe sanctions were considered or, if considered, deemed futile.

The Fifth Circuit reversed another District Court dismissal in Batson v. Neal Spelce Associates, 765 F.2d 511 (5th Cir. 1985). There, the plaintiff in

an employment discrimination case had failed to produce various documents sought by the defendant. In explaining its reversal, the court noted:

> Despite this flagrant conduct, there is nevertheless an absence in the record of any consideration by the district court of whether a less drastic sanction would have equally furthered the important deterrent aspect of Rule 37. Without explicit findings on this critical element, it is difficult to determine whether the court was within its discretion by choosing the ultimate sanction of dismissal.

In Searock v. Stripling, 736 F.2d 650, 654 (11th Cir. 1984), the Court of Appeals reversed a lower court dismissal for several reasons, one of them being the failure of the District Court to make findings "as to whether a less drastic measure than dismissal would have been an appropriate action."

Finally, in Hamilton v. Neptune

Orient Lines, 811 F.2d 498 (9th Cir. 1987), the Ninth Circuit reversed a lower court's dismissal, based on the plaintiff's failure to prosecute. Shortly before the scheduled trial date, a rift developed between plaintiff and his counsel, with the result that, on the trial date, plaintiff was not prepared to proceed. The Court of Appeals, per Judge, now Justice, Kennedy, criticized the trial judge for his failure to warn the plaintiff of the likelihood of imminent dismissal, and then noted a second ground for reversal:

> Nor does a district judge's pique excuse his failure to consider alternative sanction. While there is no requirement that every conceivable sanction be examined, meaningful alternatives must be explored (citation omitted) . . . . Where there is no indication that such alternative sanctions [e.g. imposition of witness fees on attorneys responsible

> for the cancellation of a trial date] were weighed and found wanting, a dismissal pursuant to Rule 41(b) is more difficult to sustain.

In MacMeekin, McCloud, Batson, and Hamilton, the Appellate Courts made a point of recognizing that the parties sanctioned had, indeed, violated court orders, and had delayed court proceedings. Nevertheless, each appellate court held, these violations and their consequences were insufficient reason to excuse the trial court from its duty to explicitly consider imposition of alternative sanctions, less drastic than dismissal. The court below, on the contrary, found justification for the trial court's failure in trial counsel's preceding misfeasance.

Thus, at least four Appellate Circuits, in reviewing trial court

dismissals for failure to comply with pre-trial orders, have required explicit consideration by the lower courts of alternative sanctions short of dismissal. This procedure is unquestionably sound, in view of the axiomatic preference, often stated by the Supreme Court, for deciding cases on their merits. [8]

In the instant case, the Circuit Court acknowledged the wisdom of such explicit consideration but excused the trial court's failure to do so, without a plausible reason. Its ruling flies in the face of the majority rule. It is likely to spread confusion and uncertainty among courts and attorneys, and may well lead to extended litigation

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[8] The strong preference for decisions on the merits has been expressed by this Court in both Société Internationale v. Rogers, supra, and Link v. Wabash Railroad, supra.

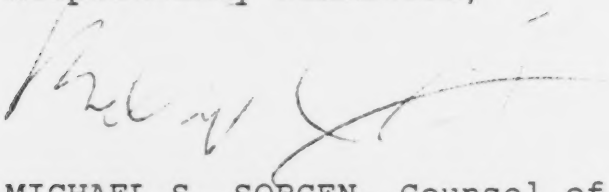
on non-substantive matters, all to no purpose. The incorrect analysis of the court and the possibility that the decision may lead to further unproductive litigation and to additional incorrect trial court rulings are sufficient reasons for this Court to issue a writ of certiorari.

CONCLUSION

For reasons stated above, this petition for certiorari should be granted. It is imperative that this Court provide guidance so that there may be uniformity and justice in the application of Link v. Wabash Railroad, supra, to dismiss a client's case for malfeasance of the attorney. At the very least, Link should be restricted to situations in which alternatives less

drastic than dismissal have been fully exhausted and the client has been warned of the imminent possibility of dismissal.

Respectfully submitted,



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April 25, 1988

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANN J. MALONE,
Plaintiff/Appellant,

v.

UNITED STATES POSTAL SERVICE, an agency of the United States, et al.,
Defendant/Appellee.

No. 85-2244

D.C. No. CV-82-5584-JPV

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, District Judge, Presiding

Argued and Submitted
July 14, 1987—San Francisco, California

Filed November 23, 1987

Before: Herbert Y. C. Choy, Senior Circuit Judge,
Joseph T. Sneed and Thomas Tang, Circuit Judges.

Opinion by Judge Choy; Dissent by Judge Tang

SUMMARY

Courts and Procedure

Appeal from judgment. Affirmed.

Appellant Malone sued appellee United States Postal Service for alleged violations of the Civil Rights Act. Malone's attorney presented the case in a confused and inefficient man-

ner. The court initially denied a motion for a mistrial, but a few hours later declared a mistrial on its own motion. The district court issued a pretrial order requiring both parties to file information with the court prior to a new trial. The court stated that motions for continuances would not be accepted. Malone's attorney informed the government that Malone would not be complying with the order although the government had already devoted considerable effort to comply with it. Malone filed objections to the pretrial order and the government moved to dismiss the action on the ground that Malone had willfully failed to comply with any aspect of it. At a hearing, Malone's attorney stated that Malone had not complied with the order because Malone lacked the financial resources. The district court granted the government's motion.

[1] A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order. [2] With the first two dismissal factors, Malone's dilatory conduct greatly impeded resolution of the case and prevented the district court from adhering to its trial schedule. [3] As to the third dismissal factor, Malone's intentional and unjustified violation of the order prejudiced the government. [4] As to the fifth dismissal factor, where the plaintiff has purposefully and defiantly violated a court order, it is unnecessary for a district court to discuss why alternatives to dismissal are infeasible. [5] Moreover, the imposition of less drastic measures for lack of preparation during the aborted first trial is sufficient indication that alternatives were considered. [6] Finally, warning a plaintiff that failure to obey a court order will result in dismissal can suffice to meet the "consideration of alternatives" requirement, as the court did when it made it clear that no continuances would be accepted. [7] Malone also argues that the district court's pretrial order was invalid. [8] The dismissal was proper because the court's pretrial order was valid under Fed. R. Civ. P. 16. [9] Malone argues that the order of dismissal unfairly punishes her for the

misdeeds of her attorney. This court has repeatedly rejected such arguments.

The dissent argues that dismissal is inappropriate in this case because there was relatively little prejudice to the government and this court should honor the general policy favoring disposition on the merits.

COUNSEL

Isable Medford, Oakland, California, Michael S. Sorgen, San Francisco, California, for the plaintiff-appellant.

Joseph P. Russoniello, Judith A. Whetstine, and Mary Beth Donley, San Francisco, California; Stephen E. Alpern and Lori Joan Dym, Washington, D.C.; for the defendant-appellee.

OPINION

CHOY, Senior Circuit Judge:

Ann Malone appeals the district court's decision, following Malone's violation of a pretrial order, to dismiss with prejudice her suit against the United States Postal Service. We affirm.

BACKGROUND

Ann Malone brought suit against the United States Postal Service (the "Government") for alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The trial began in November 1984. Because Malone's attorney presented the case in a confused and inefficient manner, the district court restricted counsel's presentation of witnesses

and evidence. Counsel believed that the court was treating her unfairly; on November 16, she made a motion for a mistrial. The court denied the motion, but a few hours later declared a mistrial on its own motion. The district court explained in the June 10, 1985, dismissal order at issue here that the mistrial had been declared because of lack of preparation on the part of Malone's attorney.

The district court issued a pretrial order on December 13, 1984. The order required both parties to file information with the court prior to a new trial. Among the information requested was a complete list of witnesses and a "thorough and complete list of each and every" direct question and anticipated response. The court stated that no oral argument concerning this requirement would be entertained, and that motions for continuances would not be accepted. The deadline for compliance with the order was April 25, 1985. Trial was set for June 1985. On April 23, 1985, Malone's attorney informed the Government by telephone that Malone would not be complying in any way with the order. The Government had already devoted considerable effort to complying with the pretrial order. On April 26, Malone for the first time filed objections to the pretrial order, requesting recusal of the trial judge, modification of the pretrial order, and a continuance.

On May 1, 1985, the Government moved to dismiss the action on the ground that Malone had willfully failed to comply with any aspect of the pretrial order. A hearing was held on May 16, at which Malone's attorney stated that Malone had not complied with the pretrial order because Malone lacked the financial resources to do so. The district court granted the Government's motion, and dismissed the action with prejudice on June 10, 1985.

Malone timely appeals the order of dismissal.

DISCUSSION

Malone makes three basic arguments against the district court's order of dismissal: 1) the district court abused its dis-

cretion in weighing the five factors which we have set forth to guide dismissal decisions; 2) the district court's pretrial order was invalid and therefore the court was precluded from sanctioning Malone's violation of the order; and 3) Malone has been unfairly punished for the faults of her attorney. We reject all of these arguments.

I. *Dismissal Factors*

The district court relied primarily on Fed. R. Civ. P. 16(f) in ordering dismissal. Rule 16(f) states that for violation of a pretrial order a judge may order sanctions as provided in Fed. R. Civ. P. 37(b)(2)(C). Rule 37(b)(2)(C) provides for the sanction of dismissal. The district court also relied on Fed. R. Civ. P. 41(b), which enables a court to order dismissal "[f]or failure of the plaintiff . . . to comply with . . . any order of [the] court . . . ." The standards governing dismissal for failure to obey a court order are basically the same under either of these rules. *See Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986).

The district court's dismissal of a case with prejudice is reviewed for abuse of discretion. *Thompson v. Housing Authority*, 782 F.2d 829, 832 (9th Cir.), *cert. denied*, 107 S. Ct. 112 (1986). "Dismissal is a harsh penalty and is to be imposed only in extreme circumstances." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986). Nevertheless, we will overturn a dismissal sanction only if we have a definite and firm conviction that it was clearly outside the acceptable range of sanctions. *Chism v. National Heritage Life Insurance Co.*, 637 F.2d 1328, 1331 (9th Cir. 1981).

[1] A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availabil-

ity of less drastic sanctions." *Thompson*, 782 F.2d at 831. It is not necessary for a district court to make explicit findings to show that it has considered these factors. *Henderson*, 779 F.2d at 1424. We may review the record independently to determine if the district court has abused its discretion. *Id.*

In the instant case, the district court did not explicitly indicate that it had considered any of the five dismissal factors in rendering its decision. The court explained its decision to dismiss as follows:

> [The Court] feels that the flagrant disobedience by plaintiff's counsel, her bad faith and her repeated failure to comply in any respect with the Court's pretrial order warrants the sanction of dismissal in this case. The Court's finding in this regard is amplified by the fact that plaintiff's counsel did not communicate in any way with the Court or opposing counsel at any time in an attempt to clarify or modify the Court's pretrial order until April 23, 1985 when plaintiff's counsel . . . informed defendants' counsel for the first time that plaintiff would not file any of the requested documents by the Court.

The court concluded that the violation of the pretrial order was deliberate and willful. The court also rejected the excuse given by counsel for refusing to comply with the order: that Malone lacked the financial means to meet the order's detailed requirements.

Because the district court did not explicitly consider the five dismissal factors set forth in *Thompson*, we must review the record independently to determine whether the order of dismissal was an abuse of discretion. *Henderson*, 779 F.2d at 1424. Our independent evaluation of the dismissal factors convinces us that the district court's order was not an abuse of discretion.

A. *The First Two Dismissal Factors*

[2] The first two dismissal factors are the public interest in expeditious resolution of litigation and the trial court's interest in docket control. It is clear that these two factors support the district court's decision to dismiss Malone's case. Malone's dilatory conduct greatly impeded resolution of the case and prevented the district court from adhering to its trial schedule. *See Chism*, 637 F.2d at 1331-32.

B. *Prejudice to Defendant*

In determining whether a defendant has been prejudiced, we examine whether the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case. *See Rubin v. Belo Broadcasting Corp. (In re Rubin)*, 769 F.2d 611, 618 (9th Cir. 1985). In the instant case, the district court was primarily concerned with counsel's bad faith decision to wait until the last minute before notifying the Government that Malone was not complying with the pretrial order. While Malone did nothing to fulfill her responsibilities under the pretrial order, the Government made a diligent effort to comply with the pretrial order in a timely manner. We have no doubt that Malone's last-minute notification of her decision not to comply with the pretrial order had a prejudicial effect on the Government. *See North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (endorsing district court's finding that "willful violation of the discovery order had, given the imminence of the trial date, prejudiced [defendant's] ability to prepare for trial"); *Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984) (prejudice includes "irremediable burdens or costs imposed on the opposing party"); *Chism*, 637 F.2d at 1331 (indicating that defendant had been prejudiced by plaintiff's continual flouting of discovery rules, failure to comply with pretrial conference obligations, and repeated violations of local court rules); *cf. Henderson*, 779 F.2d at 1425 (although no specific showing of

prejudice had been made below, "[w]here counsel continues to disregard deadlines, warnings, and schedules set by the district court, we cannot find that a lack of prejudice to defendants is determinative" in evaluating the propriety of dismissal).

[3] We hold that the prejudice to the Government from Malone's actions was sufficient to justify an order of dismissal. In so holding, we place particular reliance on the district court's determination that Malone's excuse for her conduct was groundless. Whether prejudice is sufficient to support an order of dismissal is in part judged with reference to the strength of the plaintiff's excuse for the default. *See Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980). The district court rejected the excuse that Malone lacked the financial resources to comply with the pretrial order. The court found that compliance with the pretrial order was feasible in light of the numerous depositions and interrogatories already taken by Malone's counsel and the "numerous alternatives available to [Malone]" for compliance. In addition, counsel offered no explanation as to why she waited until April 23 to inform the Government that Malone was unable to comply with the pretrial order. Malone's intentional and unjustified violation of the pretrial order prejudiced the Government in a manner which justifies dismissal.

C. *Consideration of Less Drastic Alternatives*

Malone argues that in ordering dismissal the district court did not consider the feasibility of alternatives to dismissal. We disagree.

"The district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906,

912 (9th Cir. 1986).[1] Our case law reveals that the following factors are of particular relevance in determining whether a district court has considered alternatives to dismissal: (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal?

The district court did not explicitly discuss the feasibility of alternatives to dismissal. The Government argues that the court did explicitly consider alternatives, citing to part of the transcript of the hearing regarding whether to dismiss the case. In the passage cited by the Government, the district court discussed counsel's excuse that Malone was unable to afford the extensive preparation necessary to comply with the pretrial order. The court refused to accept this excuse, stating that the "alternative" suggested by counsel would be to allow every indigent plaintiff to "conduct[] a fishing expedition" at trial. This discussion of an "alternative" by the court is not a discussion of an alternative to dismissal. Rather, it is a justification for rejecting the proffered excuse for noncompliance with the pretrial order.

[4] We have indicated a preference for explicit discussion

[1]Alternative sanctions include: "a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine the imposition of costs or attorney fees, the temporary suspension of the culpable counsel from practice before the court, . . . dismissal of the suit unless new counsel is secured [,] . . . preclusion of claims or defenses or the imposition of fees and costs upon plaintiff's counsel . . . ." *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 n.6 (3d Cir. 1982). In addition, "[p]roviding plaintiff with a second or third chance following a procedural default is a 'lenient sanction,' which, when met with further default, may justify imposition of the ultimate sanction of dismissal with prejudice." *Callip v. Harris County Child Welfare Department*, 757 F.2d 1513, 1521 (5th Cir. 1985) (quoting *Porter v. Beaumont Enterprise & Journal*, 743 F.2d 269, 272 (5th Cir. 1984)).

by the district court of the feasibility of alternatives when ordering dismissal. *See, e.g., People v. Reyes*, 800 F.2d 940, 944 (9th Cir. 1986); *Rubin*, 769 F.2d at 617. However, we have never held that explicit discussion of alternatives is *necessary* for an order of dismissal to be upheld. Under the egregious circumstances present here, where the plaintiff has purposefully and defiantly violated a court order, it is unnecessary (although still helpful) for a district court to discuss why alternatives to dismissal are infeasible. *See G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 647-48 (9th Cir. 1978).

[5] Moreover, explicit discussion of alternatives is unnecessary if the district court actually tries alternatives before employing the ultimate sanction of dismissal. *See Callip v. Harris County Child Welfare Department*, 757 F.2d 1513, 1522 (5th Cir. 1985); *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1271 (9th Cir. 1985); *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981); *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1238 (9th Cir. 1979); *Von Poppenheim v. Portland Boxing & Wrestling Commission*, 442 F.2d 1047, 1053 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). We conclude that the district court's November 16, 1984, declaration of mistrial and subsequent pretrial order constituted attempts at less drastic alternatives to dismissal. The mistrial, pretrial order, and order of dismissal were *all* instituted in response to the lack of preparation on the part of Malone and her counsel. The district court's imposition of less drastic measures for lack of preparation during the aborted first trial is sufficient indication to us that alternatives were considered prior to dismissal of Malone's case for lack of preparation. *See Callip*, 757 F.2d at 1522.

[6] Finally, the case law suggests that warning a plaintiff that failure to obey a court order will result in dismissal can suffice to meet the "consideration of alternatives" requirement. *See Buss v. Western Airlines, Inc.*, 738 F.2d 1053, 1054

(9th Cir. 1984), *cert. denied*, 469 U.S. 1192 (1985); *Titus v. Mercedes Benz of North America*, 695 F.2d 746, 749 n.6 (3d Cir. 1982) (listing "warning" as alternative sanction). Failure to warn has frequently been a contributing factor in our decisions to reverse orders of dismissal. *See, e.g., Hamilton*, 811 F.2d at 500; *National Medical Enterprises*, 792 F.2d at 913; *Rubin*, 769 F.2d at 617; *Mir v. Fosburg*, 706 F.2d 916, 919 (9th Cir. 1983); *Tolbert v. Leighton*, 623 F.2d 585, 587 (9th Cir. 1980). Although in the instant case the district court did not explicitly warn Malone that dismissal would follow violation of the pretrial order, the court made it clear that no continuances would be accepted. Moreover, we find a warning to be unnecessary here. A plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order. Rules 16(f) and 41(b) explicitly state that dismissal may be ordered for violation of a court order.

Under the circumstances in this case, the district court satisfied the "consideration of alternatives" requirement by implementing alternative measures prior to ordering dismissal for willful failure to prepare for trial. We conclude that, pursuant to the five dismissal factors, the district court's order of dismissal was not an abuse of discretion.[2]

II. *Alleged Invalidity of Pretrial Order*

[7] Malone also argues that the district court's pretrial order was invalid and therefore that her refusal to comply with the order was justified. Malone primarily contends that the court did not have the authority to require her to supply all anticipated questions and answers for the witnesses that would testify at trial. Malone concludes that the district court's order of dismissal was improper because an order of dismissal cannot be premised on the violation of an invalid order.

[2]We have not discussed the fifth dismissal factor: the public policy favoring disposition of cases on their merits. Although this factor weighs against dismissal, it is not sufficient to outweigh the other four factors, which in this case support dismissal.

It is well established that "[a]n attorney who believes a court order is erroneous is not relieved of the duty to obey it." *Chapman v. Pacific Telephone and Telegraph Co.*, 613 F.2d 193, 197 (9th Cir. 1979). We note, however, that several courts have looked to the validity of an order in deciding whether violation of that order may result in dismissal. *See, e.g., Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc.*, 560 F.2d 298, 301 (7th Cir. 1977) (district court's dismissal based on plaintiff's failure to file court-ordered pretrial report can be upheld only if it was within court's authority to compel plaintiff to conduct discovery which would provide the facts to be contained in the pretrial report); *McCargo v. Hedrick*, 545 F.2d 393, 396-402 (4th Cir. 1976) (reversing dismissal in part because violated order was premised on invalid local rule); *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1325 (7th Cir. 1976) (because Rule 16 does not authorize court to order parties to stipulate facts, sanctions for failure to so stipulate are not available); *see also Titus*, 695 F.2d at 752 (Fullam, J., concurring) (dismissal for failure to obey requirement of pretrial order is justified only if requirement is reasonable).

[8] Even if dismissal cannot be premised on the violation of an invalid order, the district court's order of dismissal was proper because the court's pretrial order was valid under Fed. R. Civ. P. 16. Rule 16 basically enables trial courts to take steps to improve the efficiency of trials. Hitherto we have not explicitly approved a pretrial order requiring the parties to provide a list of all proposed direct questions and answers. However, we have encouraged attempts by district courts to simplify trials by requiring the parties to submit proposed testimony. *See Miller v. Los Angeles County Board of Education*, 799 F.2d 486, 488 (9th Cir. 1986) (order requiring plaintiff to submit proposed questions); *Chapman*, 613 F.2d at 197-98 (order requiring plaintiffs to submit written narrative of direct testimony of each witness). The pretrial order at issue here was designed in that spirit.

Malone has submitted no evidence that the pretrial order was unfair. Because both Malone and the Government were required to supply proposed questions and answers, the pretrial order imposed no special burdens or disadvantages on Malone. Nor was the pretrial order unnecessarily or excessively burdensome. We note that another circuit has cautioned that "Rule 16 should not be implemented in such a manner that the pretrial procedure itself is more difficult and time consuming than the actual trial." *McCargo*, 545 F.2d at 401. However, unlike the order at issue in *McCargo*, the pretrial order at issue served a valuable purpose by trying to organize a very disorganized case. We conclude that the pretrial order issued by the trial court in this case was valid.

III. *Malone's Responsibility for Counsel's Malfeasance*

[9] Malone argues that the district court's order of dismissal unfairly punishes her for the misdeeds of her attorney. We have repeatedly rejected such arguments. *See, e.g., Chism*, 637 F.2d at 1332; *Anderson*, 542 F.2d at 526. We acknowledge that the degree of a plaintiff's personal responsibility for malfeasance is relevant to the propriety of dismissal. *See Myers v. Shekter (In re Hill)*, 775 F.2d 1385, 1387 (9th Cir. 1985); *see also Reyes*, 800 F.2d at 945. But in light of the egregious nature of the malfeasance at issue here, we cannot conclude that the district court abused its discretion in declining to excuse Malone for the faults of her attorney. As we stated in *Chism*, "district courts cannot function efficiently unless they can effectively require compliance with reasonable rules." *Chism*, 637 F.2d at 1332.

CONCLUSION

The district court's pretrial order was valid. The court did not abuse its discretion in ordering dismissal with prejudice for Malone's violation of the order.

AFFIRMED.

TANG, Circuit Judge, dissenting:

I respectfully dissent. Dismissal is a harsh sanction and inappropriate in this case because there was relatively little prejudice to the Government and we should honor the general policy favoring disposition on the merits, especially when the district court has failed to consider the feasibility of less drastic sanctions or to warn the plaintiff's attorney of the possibility of dismissal.

We have clearly held that a "district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986). While I agree that the consequences of an attorney's faults or defaults may be visited upon the client, when the sanction is for "deficiencies in the management of litigation," as in this case, I believe a district court nevertheless abuses its discretion when it does not consider alternative sanctions. *In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985)(per curiam).

I do not share the majority's view that the declaration of mistrial and the pretrial order were attempts at less drastic alternatives to dismissal. The district court imposed the extreme sanction of dismissal because of Malone's attorney's failure to comply with the court's pretrial order. The declaration of mistrial and the pretrial order were not sanctions but efforts to manage the litigation. When the attorney belatedly announced that she would or could not comply with the court's order, the court had a number of options that would not have had such a negative impact on the litigant. It could have considered sanctions against counsel. *See Territory of Guam v. Reyes*, 800 F.2d 940, 945 (9th Cir. 1986). Alternatively, because it was still forty-five days before the trial was scheduled to begin, the court could have warned counsel of the possibility of dismissal if she did not immediately make an effort to comply with the order. This court has frequently

required a warning prior to dismissal for proper exercise of the district court's discretion. *See Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987); *National Medical Enterprises, Inc.*, 792 F.2d at 913; *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986); *Mir v. Fosburg*, 706 F.2d 916, 919 (9th Cir. 1983)(we cannot approve dismissal when district court did not warn plaintiff that inaction risked dismissal).

The majority indicates that the prejudice to the Government from Malone's late notification of her inability to comply with the order was that the Government had made a diligent effort to comply. There would have been very little prejudice had the court warned Malone and assured compliance. If the court had modified its requirements of Malone it could have reduced the prejudice to the Government of any such change by withholding from Malone full disclosure of the Government's trial strategy.

I would reverse the district court's order because the district judge's "understandable pique [does not] excuse his failure to consider alternative sanctions." *Hamilton*, 811 F.2d at 500.

FILED JUNE 10, 1985

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANN J. MALONE, Plaintiff, v. UNITED STATES POSTAL SERVICE, et al., Defendants.	CIVIL NO. 82-5584 JPV ORDER AND JUDGMENT OF DISMISSAL

The motions of defendants for an order of dismissal, for an order striking plaintiff's motion for recusal and for sanctions and plaintiff's motions for recusal, continuance of the trial date and modification of the pretrial order came on regularly for hearing before the Honorable John P. Vukasin, Jr. on May 16, 1985. The Court having read and considered the documents filed by

both sides and the arguments of counsel makes the following findings:

1. Trial in this matter commenced in November, 1984 and resulted in the Court declaring a mistrial. The Court's decision was based upon the lack of preparation by plaintiff's counsel. She was calling witnesses in a haphazard manner and was conducting a fishing expedition during trial. It was apparent to the Court that she was attempting to engage in discovery and was conducting a fishing expedition during trial. It was apparent to the Court that she was attempting to engage in discovery and was not cognizant of the issues to be proved for trial.

2. Thereafter, on December 13, 1984, the Court held a pretrial conference. The Court assigned a trial

date of June 10, 1985, blocking out four weeks for the trial of this matter. The court then issued a comprehensive pretrial order which required both sides, no later than 45 days before the trial date to file and serve the following information:

(a) The names, residential street addresses and telephone numbers of all witnesses to be called by each party;

(b) A thorough and complete list of each and every question which that party will pose to each witness, together with the answer he expects to elicit;

(c) The order in which each party's witnesses will be called and the estimated time each witness will be on the witness stand during the direct

examination.

(d) Proposed Findings of Fact and Conclusions of Law.

3. The Court finds the requirements of the pretrial order to be proper. In issuing this order, the Court felt that it was doing plaintiff and plaintiff's counsel a favor by requiring her to engage in the basic trial preparation that would be expected of any competent trial lawyer. By complying with the court's pretrial requirements, it was hoped that plaintiff's case would be properly prepared for the eventual trial if this matter.

4. By April 25, 1985 defendants had fully complied with the Court's order including filing proposed direct testimony, both the questions and the answers, for 21 witnesses. Plaintiff,

however, did not comply in any respect with any of the requirements of the Court's pretrial order. Instead, on April 26, plaintiff filed a series of vaguely interrelated motions which are the subject of this hearing.

5. After receiving plaintiff's motions on April 26, 1985, defendants responded by filing the instant countermotions on May 1, 1985. The Court then set all matters for hearing on May 16, 1985.

6. On April 26, 1985 the Court for the first time learned of plaintiff's complete and utter failure and outright refusal to comply with the pretrial order. There had been over four and one-half months between the time that the Court issued its pretrial order before the date set for the initial compliance

whereby plaintiff could have sought modification or could have engaged in the necessary work to comply with the Court's pretrial order. The Court finds that plaintiff's failure to comply with the pretrial order is completely unjustified.

7. Rule 126(f) provides as follows:

> If a party or party's attorney fails to obey a scheduling or pretrial order ... or if a party or party's attorney fails to participate in good faith, the judge, upon motion or his own initiative may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D) ...

In particular the relevant provision of Rule 37(b)(2)(C) allows for an order of dismissal. Rule 41(b) also permits dismissal.

8. The Court recognizes that the sanction of dismissal is indeed harsh and should be used sparingly. While the

court is reluctant to impose such a sanction, it feels that the flagrant disobedience by plaintiff's counsel, her bad faith and her repeated failure to comply in any respect with the Court's pretrial order warrants the sanction of dismissal in this case. The Court's finding in this regard is amplified by the fact that plaintiff's counsel did not communicate in any way with the Court or opposing counsel at any time in an attempt to clarify or modify the Court's pretrial order until April 23, 1985 when plaintiff's counsel called defendants' counsel and informed defendants' counsel for the first time that plaintiff would not file any of the requested documents by the Court. Her request for a modification of the pretrial order which was filed on April 26, 1985 in effect

seeks only to invalidate the pretrial order and is not timely.

9. It is clear from such conduct that her failure to follow the pretrial order was in fact deliberate and willful. Plaintiff's only excuse is that she lacked the financial means necessary to comply with the Court's order. The Court finds, however, that this excuse is not genuine. There have been over eleven depositions taken and numerous interrogatories filed such that there were numerous alternatives available to plaintiff so that she could have gathered the information necessary to be filed in compliance with the Court's pretrial order. Plaintiff would seem to ask for a rule in the case of an indigent plaintiff that would allow every conceivable witness to testify at trial

no matter how remote, irrelevant or inconsequential their testimony. The Court finds that this flies in the face of the concepts of judicial economy, fairness to the litigants and to their attorneys and violates not only the letter but certainly the spirit of the federal rules regarding discovery and trial practice.

10. There also remains the very simple proposition stated by the Ninth Circuit in the case of Chapman v. Pacific Telephone & Telegraph Co., 613 F.2d 193 (9th Cir. 1979), a case which the Court finds highly relevant to the present proceedings, that a party or an attorney is not relieved from compliance with a court order until and unless the order is invalidated by an appellate court. The proper procedure is to comply

with the order and then cite the order as reversible error should an adverse judgment result. The Chapman case found that even the sanction of criminal contempt could be imposed should the court's order not be obeyed. The Chapman case dealt with narrative witness statements ordered by Judge William W. Schwarzer in which counsel had ten days to comply.

11. the Court in finding that dismissal is warranted here does not base it merely on plaintiff's failure to comply with the Court's pretrial order. The Court also bases it upon what it considers to be plaintiff's punitive conduct towards defense counsel in waiting until April 23, 1985, when adverse counsel was in the throes of fully complying with the Court's pretrial

order before advising counsel that plaintiff was not intending to follow the Court's pretrial order. Not only does this demonstrate willful disregard of the Court's pretrial order but also evidences plaintiff's attempt to have the United States Attorney's Office do all of the necessary advance preparation and then to disclose defendants' case to plaintiff as required by the Court's pretrial order without plaintiff intending to disclose her case to defendant such that fundamental unfairness results.

12. It is obvious to the Court that plaintiff's counsel does not feel bound by the federal rules, by this Court's orders, or by common courtesy to opposing counsel. Plaintiff's counsel has in effect become plaintiff's most formidable adversary. While the Court recognizes

the severity of the sanction to be imposed here, it nonetheless feels that the defendants' motion to dismiss is justified and that it should be granted in order to avoid a severe miscarriage of justice.

13. With regard to all of the other motions pending before the Court, they are dismissed as being moot. However, in effect plaintiff's motion for recusal is deemed to be denied in light of the Court's ruling on the motion to dismiss.

Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff's complaint be DISMISSED with prejudice and that judgment be entered in favor of defendants.

DATED: June 10, 1985

JOHN P. VUKASIN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Jan 25 1988

ANN J. MALONE, Plaintiff, v. UNITED STATES POSTAL SERVICE, an agency of the United States, et al., Defendants.	CIVIL NO. 82-5584 D.C. No. CV-82-5584 JPV O R D E R

Before: CHOY, SNEED and TANG, Circuit Judges.

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and all of the members of the panel reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant

rehearing en banc. Fed. R. App. P.35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANN J. MALONE, Plaintiff, v. WILLIAM BOLGER Postmaster General et al., Defendants.	NO. C-82-5584 JPV PRETRIAL ORDER FILED Dec 15 1984

In order to expedite the progress of the above-captioned litigation, and in the interests of promoting a full, fair, and just adjudication of all issues presented therein, the Court hereby issues the following Pretrial Order:

I. No later than forty-five (45) days before the trial date, each party shall file with the Court and serve on opposing counsel the following information:

(A) The names, residential street addresses, and telephone numbers of all witnesses which they will or may call;

(B) A thorough and complete list of each and every question which that party will pose to each witness, together with the answer he expects to elicit;

(C) The order in which each party's witnesses will be called, and the estimated time each witness will be on the witness stand during direct examination.

II. Any objections a party may have to the witnesses or proposed evidence proffered by the opposing party shall be filed with the Court and served upon opposing counsel no later than thirty (30) days prior to the date of trial.

III. Rebuttal or reply, if any, to the objections of an opposing party shall

be filed with the Court and served upon opposing counsel no later than fifteen (15) days prior to the date of trial.

IV. No oral argument will be entertained concerning the matters detailed in Sections I, II, and III of this Order. The Court will rule on the basis of the pleadings before the commencement of trial.

V. Motions or petitions for continuances will not be entertained.

VI. Proposed Findings of Fact and Conclusions of Law shall be filed with the Court and served on opposing counsel no later than forty-five (45) days prior to the scheduled trial date.

IT IS SO ORDERED.

Dated: December 13, 1984

J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT COURT

No. 87-1883

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANN J. MALONE, PETITIONER

v.

ANTHONY M. FRANK, UNITED STATES POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in dismissing petitioner's lawsuit pursuant to Fed. R. Civ. P. 16(f), based on her counsel's failure to comply with the court's pretrial order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 833 F.2d 128. The opinion of the district court (Pet. App. 16a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1987. A petition for rehearing was denied on January 25, 1988 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on April 25, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner brought this employment discrimination suit against the United States Postal Service and the

Postmaster General pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 1a). Following commencement of trial in November 1984, the district court declared a mistrial because of petitioner's lack of preparation (*id.* at 17a). According to the court, petitioner's counsel "was calling witnesses in a haphazard manner and was conducting a fishing expedition during trial" (*ibid.*). Prior to declaring a mistrial, the court attempted to address the problem by restricting petitioner's presentation of witnesses and evidence (*id.* at 3a-4a).

On December 13, 1984, the district court issued a pretrial order requiring both parties to produce by April 25, 1985 (45 days before trial), a list of witnesses, the questions to be presented to the witnesses, and their anticipated responses (Pet. App. 30a-32a). The order expressly stated that no requests for a continuance would be entertained (*id.* at 32a). On April 23, 1985, petitioner's counsel informed respondents that she would not comply with the order, and on April 26, 1985, she formally objected to it (*id.* at 4a; see *id.* at 19a-20a). At that time, petitioner also requested a continuance and recusal of the district court judge (*id.* at 4a).

On June 10, 1985, the district court granted respondents' motion to dismiss the complaint (with prejudice) pursuant to Fed. R. Civ. P. 16(f) (Pet. App. 16a-27a).[1] The court found "that the flagrant disobedience by [petitioner's] counsel, her bad faith and her repeated failure to comply in any respect with the Court's pretrial order warrants the sanction of dismissal in this case" (*id.* at 22a). The court stressed that petitioner's counsel never sought to communicate with either the court or re-

[1] Rule 16(f) permits a district court to order sanctions, including dismissal, for violation of a pretrial order. See Fed. R. Civ. P. 37(b)(2)(C) (see Pet. 6-9).

spondents concerning the order until two days before the deadline, when she notified respondents, and first notified the court one day after the deadline had passed (*id.* at 22a-23a). The court found that petitioner's proffered excuse—that she lacked the financial means to comply with the order—was not genuine (*id.* at 23a) and that she had exhibited "punitive conduct towards defense counsel in waiting until April 23, 1985, when adverse counsel was in the throes of fully complying with the Court's pretrial order before advising counsel that [petitioner] was not intending to follow the Court's pretrial order" (*id.* at 25a-26a).

2. The court of appeals affirmed (Pet. App. 1a-13a). The court upheld the district court's authority to issue the pretrial order (*id.* at 12a) and, after considering the five factors relevant under its precedent for determining whether dismissal was warranted under the circumstances,[2] also upheld the district court's decision to dismiss the lawsuit. The court found that the "public interest in expeditious resolution of litigation," "the trial court's interest in docket control," and "prejudice[] [to] the Government" all supported dismissal (*id.* at 7a-8a). The court rejected petitioner's claim that lack of financial resources justified her failure to comply with the order and disputed petitioner's claim that the district court had failed properly to consider alternatives to dismissal (*id.* at 8a-9a). Accord-

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[2] As described by the court of appeals (Pet. App. 5a-6a, quoting *Thompson* v. *Housing Auth.*, 782 F.2d 829, 831 (9th Cir.), cert. denied, 479 U.S. 829 (1986)):

> A district court must weigh five factors in determining whether to dismiss a case for failure to comply with a court order: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions."

ing to the court of appeals, dismissal could be upheld absent explicit discussion of alternatives by the district court where, as in this case, petitioner "has purposefully and defiantly violated a court order," the district court has "actually trie[d] alternatives before employing the ultimate sanction of dismissal," and "the [district] court made it clear that no continuances would be accepted" (*id.* at 10a-11a (citations omitted)). Finally, the court of appeals considered the level of petitioner's personal responsibility and held that "in light of the egregious nature of the malfeasance at issue here," the district court did not "abuse[] its discretion in declining to excuse [petitioner] for the faults of her attorney" (*id.* at 13a).

Judge Tang dissented (Pet. App. 14a-15a). He "agree[d] that the consequences of an attorney's faults or defaults may be visited upon the client, when the sanction is for 'deficiencies in the management of litigation,' as in this case," but concluded that the district court had abused its discretion by failing to consider alternative sanctions (*id.* at 14a). According to the dissent, "[t]he declaration of mistrial and the pretrial order were not sanctions but efforts to manage the litigation" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and is consistent with decisions of this Court. Although there is less than perfect accord among the courts of appeals on the proper standard for invoking the sanction of dismissal based on a lawyer's conduct, there is no clear conflict between this decision and the decision of any other court of appeals. Accordingly, further review is not warranted.

1. As this Court squarely held in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962), it is not "unjust" to dismiss a client's "claim because of his counsel's unexcused

conduct." "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent" (*id.* at 633-634). Petitioner is not, moreover, without recourse. Here, as in *Link* v. *Wabash R.R.*, 370 U.S. at 634 n.10, "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." Petitioner may not, however, "visit[] the sins of [her] lawyer upon [respondents]" (*ibid.*).

Nor is there merit to petitioner's assertion (Pet. 20, 32) that the court of appeals' decision squarely conflicts with decisions of other courts of appeals because it upheld the dismissal sanction even though there is "no evidence" in the record to support a finding that petitioner is "responsible for or aware of counsel's failure to comply with court rules." The court of appeals explicitly "acknowledge[d] that the degree of a plaintiff's personal responsibility for malfeasance is relevant to the propriety of dismissal" and concluded "in light of the egregious nature of the malfeasance at issue" that the district court did not abuse its discretion in ordering dismissal (Pet. App. 13a). Earlier in its opinion, the court of appeals singled out petitioner as personally responsible for the sanctions, noting that "[t]he mistrial, pretrial order, and order of dismissal were *all* instituted in response to the lack of preparation on the part of [petitioner] Malone and her counsel" (*id.* at 10a (emphasis in original)).

For that reason, the Ninth Circuit's decision in this case also does not clearly conflict with the Third Circuit's decisions in *Carter* v. *Albert Einstein Medical Ctr.*, 804 F.2d 805, 807-808 (1986), and *Dunbar* v. *Triangle Lumber & Supply Co.*, 816 F.2d 126, 128-129 (1987), where the court suggested that dismissal is appropriate only if there is

evidence "that [the client] knew of her counsel's defaults or otherwise bore some personal responsibility for his professional irresponsibility" (816 F.2d at 129). While we believe those decisions are wrong in that respect and inconsistent with this Court's reasoning in *Link* v. *Wabash R.R.*, it is reasonable to conclude in this case, unlike in those cases, that petitioner, who was present at the first trial where the misconduct commenced, "bore some responsibility for the flagrant actions of her counsel" (816 F.2d at 129).[3]

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[3] To be sure, the Ninth Circuit has not adopted the Third Circuit's supervisory rule (announced in *Dunbar* (816 F.2d at 129)), which requires a trial court to provide notice to the client prior to ordering dismissal as a sanction for attorney misconduct, but no circuit conflict is presented in this case on that account. The primary purpose of the *Dunbar* rule is to allow the party an opportunity to be heard prior to dismissal. That is a matter distinct from the issue raised by the petition here, which is whether dismissal is valid only if the party actively participated in, or was actually aware of, the attorney's misconduct.

The other court of appeals decisions upon which petitioner relies also do not conflict with the court's decision in this case because they generally apply the same legal principles that were applied by the court in this case, and their differing results are largely the product of each court's careful consideration of the particular facts before it. For example, the D.C. Circuit in *Shea* v. *Donohoe Constr. Co.*, 795 F.2d 1071 (1986), which petitioner discusses (Pet. 20-22), did not hold that dismissal is appropriate only if the client is himself personally at fault. The court stated only that it is "reluctant to affirm dismissal *under the punishment or deterrence rationale* unless the client himself is shown to deserve the sanction" (795 F.2d at 1077 (emphasis added)). The court made clear that "[t]here are times when prejudice to another party or to the judicial system leaves no choice but to dismiss an innocent client[]" (*id.* at 1079) and that "[a]s in the case of dismissal based on prejudice to the defendant, a dismissal based on prejudice to the judicial system need not turn on the level of the client's—as opposed to the counsel's—complicity" (*id.* at 1076). In this case, the district court's sanction was not supported solely by a punishment or deterrence rationale. The court of appeals found that prejudice to

Petitioner also underestimates the extent to which a party may be held legally responsible for actions taken by her lawyer on her behalf. As this Court explained in *Link* v. *Wabash R.R.*, 370 U.S. at 634 (quoting *Smith* v. *Ayer*, 101 U.S. 320, 326 (1880)), in "our system of representative litigation," "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " In a case such as this one, therefore, a party can be "held to be

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the defendant and to the judicial system supported dismissal (Pet. App. 7a-8a).

Petitioner's reliance (Pet. 22-24) on the Fifth Circuit's decision in *Flaksa* v. *Little River Marine Constr. Co.*, 389 F.2d 885, cert. denied, 392 U.S. 928 (1968), is likewise misplaced. The court there did not announce a flat ban against dismissal based on an attorney's misconduct. The court concluded that dismissal was inappropriate in the case only because under "the circumstances of the case" the party "was in no way * * * connected with or responsible for, his [counsel's] dilatory conduct" (389 F.2d at 889). The court, moreover, did not dispute that a "sanction[] may be imposed upon an innocent litigant for derelict conduct of his counsel," but reasoned that dismissal "should be the last resort" (*id.* at 889 n.11). Here, of course, petitioner was not "[un]connect[ed]" to her counsel's misconduct, and, as described in the text below, the district court first attempted less severe sanctions.

The decisions in *Scarborough* v. *Eubanks*, 747 F.2d 871 (3d Cir. 1984); *Dove* v. *Codesco*, 569 F.2d 807 (4th Cir. 1978); *Carter* v. *City of Memphis*, 636 F.2d 159 (6th Cir. 1980), and *In re Russell*, 746 F.2d 1419 (10th Cir. 1984), cited by petitioner (Pet. 25-26 nn.2-5), also do not aid her cause. The courts of appeals in those cases held that the district court had erred in ordering dismissal as a sanction for attorney misconduct, but in none of those cases did a court rule that dismissal was a valid sanction only if the client actively participated in, or was actually aware of, his attorney's misconduct. The courts instead considered, and grounded their decisions on, a variety of factors, including the level of the party's responsibility. See *Scarborough* v. *Eubanks*, 747 F.2d at 878; *Dove* v. *Codesco*, 569 F.2d at 810; *Carter* v. *City of Memphis*, 636 F.2d at 161; *In re Russell*, 746 F.2d at 1420.

bound by [his] counsels' inaction" based on "inferences of conscious acquiescence" (*id.* at 634 n.10).

2. The court of appeals also correctly rejected petitioner's contention (Pet. 34-43) that the district court abused its discretion by ordering dismissal without first explicitly considering alternative, less severe, sanctions. As the court of appeals explained, no explicit discussion of alternatives is necessary where, as in this case, "the district court actually tries alternatives before employing the ultimate sanction of dismissal" (Pet. App. 10a (citations omitted)). Here, "the district court's November 16, 1984, declaration of mistrial and subsequent pretrial order constituted attempts at less drastic alternatives" (*id.* at 10a). In this case, moreover, as the court of appeals further held (*id.* at 10a-11a), explicit consideration was especially unnecessary because the district court warned petitioner in the pretrial order that "[m]otions or petitions for continuances will not be entertained" (*id.* at 32a). In these circumstances, "[a] plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order" (*id.* at 11a).

For this reason, petitioner is also mistaken in contending (Pet. 36, 42-43) that the court of appeals' decision conflicts with decisions of other courts of appeals. The courts in *Searock* v. *Stripling*, 736 F.2d 650 (11th Cir. 1984), and *In re MacMeekin*, 722 F.2d 32 (3d Cir. 1983), reversed the district court's dismissal orders, but they did so largely for reasons wholly unrelated to the need for a discussion of alternative sanctions (see *Searock* v. *Stripling*, 736 F.2d at 653-655; *In re MacMeekin*, 722 F.2d at 34-35). And, although the Fifth Circuit in *Batson* v. *Neal Spelce Associates*, 765 F.2d 511 (1985), and *McCloud River R.R.* v. *Sabine River Forest Products, Inc.*, 735 F.2d 879, 883 (1984), reversed dismissal orders because the district court

had not explicitly considered alternative sanctions, in neither of those cases had the district court (as in this case) previously tried to address misconduct by imposing less severe sanctions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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